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In This Issue

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LET US EXAMINE THE PLEBISCITE

By Stevens Fargo
President, Los Angeles Bar Association

Stevens Fargo

THE Assocation has conducted plebiscites for about thirty years in respect to certain contested offices requiring legal training. They have been held at the expense of the Association and upon the principle that the Bar is best able to pass upon the qualifications of aspirants for such offices. We have recently observed the operation of the plebiscite upon two contested Superior Court offices and a contested District Attorneyship, in which the endorsed candidates prevailed. The more important an institution is, the more fitting it is that it should be examined periodically for improvement of method and effect.

As to method, I was surprised at the misunderstanding shown by our own members in calls and letters I have had. A much broader program of education on the nature of the plebiscite is indicated. The By-Laws of the Association do not leave much latitude with the Board of Trustees in determining whether a plebiscite shall be taken. Article IX of the By-Laws provides that a plebiscite shall be taken ". . . unless the Board of Trustees for compelling reasons and by two-thirds vote of the entire Board shall decide that as respects any particular election it is impracticable or inadvisable to conduct a plebiscite." The candidate polling the greatest number of votes is automatically endorsed. The poll is not only taken of our own members (2,805) but of all judges and lawyers in the County, over 7,000. This accounts for the expense of the poll, amounting to $1,061.54 for the last effort

in money and many hours of work for our staff and volunteer members of the Association. The Board of Trustees has discretion, after the endorsement is announced, whether or not to conduct a campaign for the endorsed candidates. It is nearly always felt that the endorsement should be made effective by an active campaign supported by donations for that purpose.

It is my personal view that the principle of the plebiscite is vitally important and the method entirely proper. Judicial and legally administered offices require legal scholarship, the utmost integrity and suitable temperament. The requirements are technical, and should be measured by the technicians of the Bench and Bar. It is perfectly obvious that lawyers who are constantly in touch with the courts, District Attorney's office, etc., are in a better position than the lay public to pass upon the fitness and qualifications of candidates for such offices, for the same reasons that the Engineers and Doctors are much better qualified than the lay public to pass upon the fitness of candidates for the office of City Engineer and Health Officer. So long as general election for such offices must be held, the voting public should be guided by the sober choice of its professional servants.

I am also satisfied with the method. If an endorsement is to be obtained it must be on the basis of the greatest number of votes cast. I would be happier if more of the lawyers voted, and were better and more personally informed on the candidates. We are planning more social affairs where the office lawyer may meet the Bench.

The stature of the endorsement must be increased even more. The last election marked a notable step forward. The Los Angeles Times not only endorsed the Bar's selections but published an editorial approving the principle that the recommendations of the lawyers should be followed by the voting public. I look forward to the day when no judge need conduct a campaign for election, and a candidate for judicial office will feel constrained to withdraw from a contest in which he shall not have the endorsement of his fellow lawyers. The millennium will have arrived when the appointing power will call upon the Bar to name the occupants of all offices to be filled by lawyers. The Bar will gladly and capably undertake this responsibility.

The Judgment Creditor Encounters Homestead Problems

By James F. Healey, Jr.*

James F. Healey, Jr.

AS attorney for a judgment creditor, you have undoubtedly had occasion to run afoul of a statutory homestead. A great portion of the remarks contained herein are devoted to problems arising out of marital homesteads, since that type of homestead appears to provoke most problems, but many of the points mentioned are equally applicable to the "Homestead of other persons," as provided for in Sections 1266 to 1269, inclusive of the CIVIL CODE.

The Attitude of Courts Toward Homesteads

The statutory homestead in California had its beginning in our Constitution, wherein it is provided (Article XVII, Sec. 1) that "The Legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families." Our Legislature complied with this mandate and in 1872 enacted suitable legislation therefor, in CIVIL CODE Sections 1260 *et seq.*

The general object of homesteads is explained in the case of *Estate of Fath*, 132 Cal. 609 at page 613, wherein the Court says:

> "The object of all homestead legislation is to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors. Such legislation, being of a remedial character, is to receive a liberal construction."

The motive of the declarant in conveying the homestead is immaterial and the principles relating to a conveyance made to hinder,

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delay or defraud creditors are inapplicable.[1]

Effect of Attachment

A writ of attachment will ordinarily hold real property and serve to lend priority to the judgment when obtained, as against matters which occur after the attachment is filed; but a subsequent declaration of homestead will precede a prior attachment. In *Wilson vs. Madison*, 58 Cal. 1 an attachment was levied upon the premises in question and subsequently a judgment was had in the action on November 6, 1876 — but no abstract of judgment was filed or recorded in the Recorder's office. Thereafter, on November 10, 1876, a declaration of homestead was made. The court held that a sale under the judgment did not convey title since the judgment did not constitute a lien at the time of the declaration of homestead.

Similarly in *Jacobson vs. Pope, et al.*, 214 Cal. 758, at page 760 the court recognized that a homestead was superior to attachments, not reduced to judgment liens prior to the filing of the declaration of homestead and at page 760 stated: "It is the policy of the homestead law to protect the home against the enforcement of the debts of the declarant. Such debts may be and often are just obligations. 'The law authorizes a debtor to erect a barrier around the home, over which the sheriff, although armed with final process under such a judgment, cannot pass. With the policy of the law, or the abstract morality of a particular transaction, we have nothing to do.' (Fitzell v. Leaky, 72 Cal. 483 (14 Pac. 198, 201).) . . . Since the attachments had not ripened into judgment liens before the plaintiff's homestead was perfected, the homestead was not affected by them."

Effect of a Judgment

As has been stated in several of the cases above quoted, the judgment itself does not constitute a lien upon real property unless and until an abstract thereof has been recorded, as required by CODE OF CIVIL PROCEDURE Section 674. Moreover, where a homestead has been declared before such abstract has been recorded, Civil Code Sections 1240 and 1241 act as a bar to a *conventional*

[1] In *Parker vs. Riddell* (41 C.A.(2d) 908), the Court stated at page 914: "Conveyances of property made to hinder and delay creditors are permissible if the property so conveyed is a homestead. . . . (Civ. [Citation of Authority] . . . (5) Such statutes are benevolent and remedial in character and may be liberally construed. Unless a judgment which constitutes a lien is obtained before the filing of the declaration of homestead, the property is ordinarily exempt from execution. A homestead law is to protect property from existing debts. (*Gray vs. Brunold*, 140 Cal. 615 (74 Pac. 303).)"

See also *Yager vs. Yager*, 7 C.(2d) 213.

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SUGGESTIONS FOR FILING IN THE SUPERIOR COURT

J. F. Rice*

THE topics selected for brief mention here are those which cause the greatest number of difficulties to the practicing attorney; and it is hoped, therefore, that this article will shed some light on the procedure of the county clerk's office even though it may not make some of the filing requirements more palatable.

PREPARATION OF DOCUMENTS FOR FILING

In preparing documents for filing in the Superior Court it is essential that Rule 1 of the "Rules for the Superior Courts as adopted by the Judicial Council" should be followed closely since Rule 1(f) provides "The Clerk of the court shall not accept for filing or file any papers which do not comply with this rule. . . ." Upon the showing of good cause, however, the court may permit the filing of papers which do not comply. (Rule 1(f).)

Some of the most common violations of this rule are:

(1) The use of paper which is other than the kind required by the rule, to-wit: "opaque, unglazed, white paper of standard quality." Since glazed paper does not take the ink, if this requirement is not observed, the clerk finds it very difficult to place the number or the file mark on the document.

(2) Failure to have the lines on each page double-spaced and numbered consecutively (descriptions of real property may however, be single-spaced.)

(3) Offering for filing documents in which some or all of the pages are carbon copies. The rule provides that "All papers shall consist entirely of original pages which shall be firmly bound together at the top."

(4) A failure to endorse "immediately below the number of the case, the nature of the paper, and on all complaints and petitions, the character of the action or proceeding."

Papers should never be offered for filing with riders attached. If the printed form does not have room for all of the information required, the entire document should be typewritten.

ACTIONS IN BRANCH DEPARTMENTS

(a) Commencing Action in Branch Department.

Attorneys desiring to file actions in branch departments outside of the county seat should consult Rule 17 to 22 inclusive of the Superior Court of Los Angeles County. If an action is to be filed

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originally in a branch department the same must be filed in duplicate in the branch department together with a Certificate for Assignment and Transfer attached to both the original and duplicate copy. The forms of Certificate for Assignment and Transfer are furnished by the clerk's office. All subsequent papers must be filed in duplicate and may be filed either in the branch department in which the action is pending or in the main office in Los Angeles. However, it is better practice to file directly in the branch all papers which require docketing upon the calendar.

(b) Transfer to or From a Branch Department.

All motions to transfer any action pending in a branch department to another branch or to Los Angeles must be noticed for hearing in the branch in which the action is then pending.

All motions to transfer actions on file in Los Angeles to a branch department must be noticed for hearing before the Presiding Judge in Department 1 on any court day at 9:30 A.M. giving 5 days' notice to the opposing counsel.

When an action on file in Los Angeles is ordered transferred to a branch department, the party applying for the order of transfer must, within 15 days after the making of such order, prepare and file with the clerk complete copies of all proceedings and other papers, except documentary evidence, contained in the official file of such action or proceeding at the time of its transfer, including the order for transfer. All of these documents must be arranged in the same form and sequence as the original file and must be certified by the clerk as a complete copy of the original file at the time such order was made. The clerk can not transfer the original file to the branch department until the duplicate copy has been prepared and certified. Arrangements for the certification of the duplicate papers must be made with the Certification Section of the Clerk's office in Room 700 Hall of Records.

After the making of an order for transfer of an action or proceeding to a branch department or after the filing of an action or proceeding in a branch department, the party filing each pleading or other paper, except documentary evidence, shall prepare and file with the original a complete copy. It is the clerk's duty to refuse to accept any such original pleading, or other paper, unless such copy is tendered for filing at the same time.

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LOS ANGELES BAR ASSOCIATION COMMITTEE ON LEGAL ETHICS

OPINION NO. 190

(February 19, 1952)

FEES: CONTINGENT DIVISION WITH SECRETARY, AN UNLICENSED PERSON—An attorney is prohibited from agreeing to compensate a secretary for extra work on a case in the form of a contingent percentage of the fees received.

The question for consideration appears in the following quoted text of a letter received from a firm of attorneys:

> "A firm of attorneys has had in their employ for many years last past a secretary who, in addition to the performance of her regular duties, performed special services in the nature of extra bookkeeping work and typing work on a particular case involving a considerable sum.
>
> The attorneys (her employers) propose to enter into an agreement with her that in lieu of paying her for special work or overtime work devoted to such particular case that they would pay her a percentage of the fees earned in such a special case when, as and if the same was received, with the understanding that if for any reason such fee should not be received that she would receive no compensation for any of her extra and overtime work.
>
> The employee was not, either directly or indirectly, or in any manner, responsible for bringing the business into the office. The employee is entirely satisfied with such an arrangement.
>
> Would such an agreement be violative of the ethics of the profession?"

The Committee is of the opinion that the proposed agreement would violate both Rule 3 of the Rules of Professional Conduct of the State Bar of California, and Canon 34 of the Canons of Professional Ethics of the American Bar Association:

The pertinent portion of the text of Rule 3, above, is as follows:

> "A member of the State Bar shall not . . . , except with a person licensed to practice law, . . . directly or indirectly share compensation arising out of or incidental to professional employment; nor shall he directly or indirectly aid or abet any person not so licensed, . . . to practice law or to receive compensation therefrom . . ."

Canon 34, above, provides:

> "Division of Fees.—No division of fees for legal services

is proper except with another lawyer based upon a division of service or responsibility."

Assumedly the secretary is not a member of the State Bar. Regardless of the fact that she performs special services (the nature thereof is immaterial), and notwithstanding that such services are in addition to her regular duties, the determinant fact is that she, as an unlicensed person, would be receiving part of the fees paid by the client in consideration of the rendition of legal services by her employers. The Committee likewise deems it of no importance in reaching the foregoing conclusions that the attorneys' employee would receive nothing if, for any reason, the attorneys received no fee. If anything, such feature of the proposed agreement services further to mark the arrangement as improper.

Were anything in addition to a mere reading of Rule 3 and Canon 34, above, required to make the Committee's conclusions immediately clear, reference may be made to Opinion No. 48 of the Committee on Professional Ethics of the American Bar Association. Such opinion holds that Canon 34 condemns *any* division of fees with laymen.

Distinction was made in that opinion between the proper and permissible employment of laymen (*e.g.*, draftsmen or engineers), who are paid in the same manner as any other person who is not admitted to the practice of law, and the prohibited division of legal fees with laymen.

Johnson v. Davidson, 54 Cal. App. 251 (1921), does not affect the conclusions expressed above, for two sufficient reasons:

(a) The decision antedates the adoption of The State Bar Act in California under which Rule 3 and the other Rules of Professional Conduct were promulgated;

(b) The case is not a decision upon the issue here con-

sidered (see pages 255 and 258 of the Opinion), inasmuch as consideration of the nature and effect of Davidson's contract with the plaintiff was not necessary to the decision.

This opinion, like all opinions of this Committee, is advisory only (By-Laws, Article VIII, Section 3).

OPINION NO. 191

(May 14, 1952)

LAY INTERMEDIARIES—STIRRING UP LITIGATION—EDUCATION OF PUBLIC—LEGAL QUERIES COLUMN IN NEWSPAPER—BAR ASSOCIATION ACTIVITIES.—A Bar Association may not answer specific questions whether the answers given be privately submitted to the inquirer or be publicly proclaimed in newspapers or periodicals, but may publish or publicize legal information of general interest as a public service both to the Bar and to the lay public and may aid in supplying to the public legal knowledge sufficient to avoid litigation.

A member of the local Bar has asked this Committee if a local Bar Association may properly bring free legal advice to people in the community, so as to enable them better to avoid entanglements with the law, by answering without charge, in a newspaper column, specific questions sent to the newspaper. The Bar Association would set up a panel of attorneys who would meet to consider the questions. After reaching a concensus opinion through group consideration of the question, the attorneys would assign to one of the attorney members of the panel the responsibility of writing an opinion which would be published in the newspaper "legal forum" as an answer to the specific question sent in to the newspaper. The name of the inquiring party is not published in the newspaper, nor the name of the lawyer writing the opinion. It is not clear from the inquiry whether the name of the inquiring party would be disclosed by the newspaper to the lawyers of the Committee or to the Bar Association. It is apparent that the proposed activity as set forth in the inquiry raises fundamental questions of legal ethics as well as grave questions of policy with respect to performance by a Bar Association of its duty to the public.

I

A Bar Association may publicize matters of law, and caution the public in general with respect to the necessity and wisdom of securing counsel at the incipient stage of any controversy and

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Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of July, 1927, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

CHIEF Justice **William H. Waste, Thomas C. Ridgway** and **Kemper Campbell** of Los Angeles, **Charles Beardsley** of Oakland, and **Joseph J. Webb** of San Francisco, the five members of the Board of Governors appointed to put into effect the provisions of the Self-Governing Bar on July 29th, have met and adopted a form of registration for all attorneys in the state. Dues for the balance of the first year will be $3; payment before October first entitles one to vote in the election of the remaining 11 members of the Board of Governors who are to be chosen from each Congressional district in the state. Dues for next year will be $5. Lawyers who are not registered by the first meeting of the **State Bar** to be held next November 18th at San Francisco may not practice after that time.

* * *

As a result of the Julian fiasco, State Corporation Commissioner **J. M. Friedlander** is seeking radical changes in the "blue sky" laws of California to give more effective protection to the investing public. **Thomas C. Ridgway,** President of the California Bar Association, has appointed the following committee members to assist in tightening up the law: **Louis W. Myers,** former Chief Justice of the State Supreme Court; **M. C. Sloss,** former Associate Justice of the same tribunal; **H. L. Carnahan,** federal receiver for the Julian Petroleum Corporation; **Mark Slosson,** prominent Los Angeles attorney; and **James S. Bennett,** leading Bar Association member, who will be chairman.

Brothers-In-Law

By George Harnagel, Jr., Associate Editor

George Harnagel, Jr.

NOT long ago the architect of this department was in **New York** and took occasion to look in on the *Investment Bankers* case which has been on trial before Judge Harold R. Medina for many months. His objective was to learn at first hand something of the way in which a so-called "big case" is conducted. On the occasion of his first visit the courtroom was as void of life, but as full of its vestiges, as the ruins of Pompeii, and he learned point number one: That the case is on trial for three weeks and then off trial for a week; and this was an "off week." Point number two: He knew that defense counsel had a "central office" staff which indexed the record and the mass of documentary evidence, but he was surprised to find that this staff had commodious office space immediately adjacent to the courtroom. On a subsequent visit, during an "on week," he discovered something new and delightful in the way of civil procedure: The judge, the clerk, the reporters and counsel for both sides, in short "everybody," went to the ball game in the afternoon. Not only that, but after the game they sat down together at a steak dinner.

* * *

The same trip included **Boston,** and there your inquiring reporter wanted to see something of the *United Shoe Machinery* case, another out-size antitrust suit, which has been pending before Judge Charles E. Wyzanski, Jr. He found that the taking of testimony had at long last been concluded, but he was fortunate to meet a number of the attorneys who have participated in it. These included John L. Hall of Choate, Hall & Stuart, who has carried the burden of chief defense counsel for six years or more and who was engrossed in preparation for the argument. Mr. Hall, it should be recorded, has just turned 80. Your reporter made particular note of that with the thought of bringing it to the attention of some of his friends (partners included) who seem to think that after 65 they should ease off on everything but golf.

The Minneapolis Star and Tribune, with the blessing of the **Minnesota** State Bar Association, has conducted a public opinion poll to determine what the people of that state think of its lawyers. Statistics developed included the following:

(1) 53% had hired a lawyer at some time or another. Of these, 92% said they were satisfied with his services, 6% reported dissatisfaction, and 2% gave inconclusive answers.

(2) Considering everybody polled, 20% regarded lawyers' fees as high, 47% thought them reasonable, and 32% had no definite opinion. When, however, only the answers of those having a definite opinion are considered and a line is drawn between those who have hired lawyers and those who have not, the following significant figures appear:

	High	Reasonable	Low
Have hired lawyers	24%	74%	2%
Have not hired lawyers	41%	59%	0%

(3) Again considering only those who had a definite opinion, a comparison of their views as to doctors', dentists' and lawyers' fees is given by the following tabulation:

	High	Reasonable	Low
Doctors' fees	37%	63%	0%
Dentists' fees	39%	60%	1%
Lawyers' fees	29%	69%	1%

* * *

"As the young lawyer studies precept upon precept, usually by the case method, he has presented to him point after point illustrated by the case of Jones against Smith. It is always some party against another party. He dreams of the future when his client, through his superior efforts, will be able to triumph completely over his adversary. He develops a belligerent complex. His law school has not taught him the art of friendly negotiation and compromise. The cases he has studied do not illustrate the very frequent occurrence when both sides are wrong, where a level head and a firm but friendly hand are needed to induce both sides to see the error of their ways, and to bring the opposing sides to a settlement without a fight, without months of delay and without needless expense."—Joseph H. Hinshaw, President of the **Illinois** State Bar Association.

TAXATION REMINDER

By the Committee on Taxation of the Los Angeles Bar.

(This is another in the series of brief statements intended as tax refresher notes for the assistance of lawyers in general practice.)

TAX ASPECTS OF PURCHASE AND SALE OF PROPERTY.—Each lawyer, when called upon to advise a client who is buying or selling property, should be alert to the fact that tax implications are involved.

Assume the purchase and sale of a going business, including land, building machinery, receivables and the like. If the agreed sale price is a total of $50,000.00 without any allocation among the items sold, decisions which an allocation might have avoided must be made by both buyer and seller. The new owner must know what part he paid for the land, how much for the building, what for the machinery and receivables because he cannot depreciate the real estate or receivables but must depreciate the building and machinery, if he is to be in the best tax position. Usually, the building and machinery would be depreciated at different rates. How much simpler from his point of view to make the itemization in the contract of purchase or escrow, i.e., $1,000.00 for land, $5,000.00 for building, $250.00 for machine A, $500.00 for machine B, etc., arriving at a total of $50,000.00. The seller must know the sale price of the items to know whether he had a gain. Of course, before agreeing to the figures, he would want to check his own cost of each of the items to find out what his tax result would be.

You may have a client selling or buying a home. If he is only going to live in it there is no need to allocate the cost between land and buildings because he cannot depreciate the building for income tax purposes. If he intends to rent or is buying rental units, then he can depreciate the buildings and the allocation is important. If not done by agreement a common basis for the allocation is the ratio of the assessed value of land and improvements (as shown on the tax bill) to their total. For example, land is assessed at $250.00 and improvements at $750.00—total $1,000.00. If your client buys rental units for $10,000.00, the allocation on this method would be $2,500.00 as cost of land and $7,500.00 as cost of building. You would then determine the remaining useful life of the building (*e.g.* 20 years) and your depreciation rate would be 5% of the $7,500.00.

In the final analysis, the allocation must be closely related to the actual market value of the respective items being purchased, regardless of what basis of allocation is used.

SUGGESTION FOR FILING

(Continued from page 364)

CHANGE OF NAME

Petitions for change of name should state in the caption the names of all petitioners, including minor children and must be signed by each of them. If a minor is over fourteen years of age, he should sign the petition himself; if he is under fourteen years of age, a parent should sign the minor's name and indicate that it was signed by the parent. The petition should be verified by any petitioner who may be unable to appear in court at the time of the hearing. The names of the parties should be set forth in full; do not use initials. A petitioner may, however, drop a name and take just an initial in the proposed new name.

Before preparing the petition, it is advisable that petitioner's birth certificate be checked so that the name or names as they appear on the birth certificate, together with any other name or names which the petitioner has used, may be shown in the petition, viz: John Campbell, also known as John Bell, also known as Jack Bell.

If the father of a petitioner is living the petition should show his name and address; if he is not living, the petition must state that he is deceased and must give the names and addresses of other near relatives.

PETITION FOR A WRIT

All petitions for the issuance of any prerogative writ must be served upon the respondents and the real party in interest named in the petition before filing. However, the court, in its discretion and for good cause, may allow the petition to be filed without service (1107 C.C.P.). Since the real party in interest or respondent has 5 days after being served with the petition within which to serve and file points and authorities in opposition to the granting of the writ, application for the issuance of the alternative writ should not be made until the expiration of the 5 day period.

All proceedings for writs of review, mandate, or prohibition wherein any municipal or inferior court, or any officer thereof in his official capacity, is a party, shall be had in the Special Writs Department. The Special Writs Department is presided over by one or more, or all of the judges assigned to sit in the

Appellate Department of the Superior Court. All other proceedings for writs of review, mandate or prohibition, are heard in the Writs and Receivers Department which is Department 34 of the Los Angeles Superior Court.

ACTION FOR LIBEL OR SLANDER

In an action for libel or slander the clerk, before issuing the summons therein, must require an undertaking on the part of the plaintiff in the sum of $500.00 with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action is dismissed or the defendant recovers judgment, that they will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action, or on appeal, not exceeding the sum specified in the undertaking. An action brought without filing the undertaking required shall be dismissed. (Section 4317, General Laws.)

If there is more than one plaintiff, a $500.00 bond must be filed for each plaintiff.

PETITIONS AND ORDERS UNDER TORRENS TITLE ACT

All petitions and orders under the Torrens Title Act (land

registration) should be presented to the Land Registrar in the County Recorder's office before being filed in the office of the County Clerk. By so doing errors are caught and time is saved for the petitioner and the court. When the registrar finds that the petition and order are properly drawn he places a margin notation thereon for the court's information.

APPOINTMENT APPRAISERS FOR HOMESTEAD

All applications for the appointment of appraisers for homesteads, pursuant to Sections 1245 to 1248 (inclusive) of the CIVIL CODE, must be filed as separate proceedings, requiring a new filing number and the payment of the regular filing fee.

Such a petition must contain all of the facts required by Section 1246 of the CIVIL CODE, must be verified, may be noticed for hearing on any Monday, Wednesday or Friday at 9:30 A.M. in Department 34, and must be served as provided in Section 1248 of the CIVIL CODE.

PETITIONS FOR RECONCILIATION

All petitions for reconciliation must be filed in the Children's Court of Conciliation which is presently located in Room 1701, City Hall. The clerk's office, which is at the same location, has printed forms for the petition which may be filed without the necessity of the payment of any fee.

ATTACHMENT

In requesting an attachment, the following papers should be presented: the complaint, the affidavit for attachment (538 C.C.P.), the undertaking on attachment (539 C.C.P.), summons, writ of attachment (540 C.C.P.), and the statement to the clerk on attachment.

Section 539 C.C.P. provides that the sum specified in the undertaking shall be such as the clerk, judge, or justice of the court in which the action is pending may require. A schedule has been established in the clerk's office whereby the clerk determines the amount of bonds on attachment, and, therefore, it is good practice to telephone the clerk's office in advance to determine the amount of the undertaking required. Most of the surety companies are familiar with the clerk's bond schedule, and, therefore, an attorney securing an undertaking from any one of these companies may get this information directly from them.

Several writs to the sheriffs, constables, and marshals of any county or counties may be issued upon the same affidavit and undertaking within 60 days after the filing of the affidavit and undertaking (Section 540 C.C.P.).

After the return and filing of the writ of attachment or upon filing by the plaintiff of a verified affidavit setting forth the fact that the writ of attachment has been lost, the clerk, upon demand of the plaintiff at any time before judgment, may issue an alias writ which shall be in the same form as the original without requirement of a new affidavit for attachment or of a new undertaking as provided in Section 539 of the CODE OF CIVIL PROCEDURE (Section 559½ C.C.P.).

SUMMONS

An alias summons may be issued at any time within which the original summons might have been served and filed. The original summons must be on file or if the same has been lost an affidavit stating that fact must be filed before the issuance of the alias summons. The clerk issues the alias summons as a matter of course and no court order is required.

When an amended or supplemental complaint has been filed in an action in which all of the defendants have not been served with the original complaint and summons, a summons on the amended or supplemental complaint must be issued for service upon said defendants.

In partition actions, the summons must contain a description of the property sought to be partitioned, and must be directed to all of the persons named as defendants in the complaint, and when it shows that some person whose name is unknown to the plaintiff has or claims an interest in or lien upon the property, the summons must also be directed to "all persons unknown who have or claim any interest or lien upon the property." (Section 756 C.C.P.).

In an action by a person in adverse possession to determine adverse claims and cloud under Section 749 of the CODE OF CIVIL PROCEDURE, the summons, in addition to the matters required by Section 407 of the CODE OF CIVIL PROCEDURE, must contain a description of the property and a statement of the object of the action. In the summons the unknown defendants must be designated, as in the complaint, whether they are the sole defendants or not. (Section 750 C.C.P.).

MOTION TO FILE PLEADING OR AMENDED PLEADINGS

When a notice of motion for leave to file pleadings or amended pleadings is filed, a copy of the proposed pleadings should be attached to the notice of motion. When the motion is granted, the original should then be served and filed.

Some attorneys follow the practice of filing the original pleading or amended pleading at the time they file the notice of motion. When this procedure is followed it is important at the time the court grants the motion that the court's order also provides that the proposed pleading heretofore filed be deemed served and filed as the original.

ORDER TO SHOW CAUSE CONCERNING CHILD SUPPORT, ALIMONY, ETC.

All applications for order to show cause or other preliminary orders, including preliminary orders for alimony, custody or support of children, attorneys' fees, injunction or appointment of receivers and all special matters of like nature, in connection with actions for divorce, separate maintenance and annulment of marriage, are heard in the domestic relations department, Department 8 of this court. The affidavit for and the orders to show cause in these matters must be presented to the clerk in Department 8. If the affidavit is sufficient the clerk will set a date of hearing on the order to show cause and have the judge sign the order.

If the defendant is requesting the order to show cause, the affidavit should be referred to a clerk in the Civil Filing Division in Room 700, Hall of Records for memorandum as to whether or not an appearance fee is due, before presenting to the clerk in Department 8. If, however, the party knows that a fee is due, the document may be presented directly to the clerk in Department 8 together with the appearance fee.

When the order to show cause has been signed by the court, the original is filed by the clerk and copies thereof should be served upon the necessary party.

When an attorney desires to notice a motion for hearing in Department 8, he must first secure from the clerk of said department a date which is satisfactory to the court's calendar.

MEMORANDUM FOR SETTING FOR TRIAL

Many Memorandums for Setting for Trial are offered for filing which are either not signed by the attorney for the moving party or which do not have proof of service endorsed thereon. Also, care should be taken that the case is at issue before the filing of the Memorandum for Setting for Trial. Rule 6 provides that "no civil case shall be set for trial until it is at issue and unless a party thereto has served and filed a Memorandum as provided herein; provided, however, if a case is set on stipulation, the Memorandum need not be served but shall be filed with the

stipulation." Printed forms of Memorandum of Setting for Trial are furnished by the clerk's office and should be used.

REQUESTING ENTRY DEFAULT

In requesting the entry of defaults, as distinguished from entry of default judgment, two forms are furnished by the clerk's office.

If the defendant has been personally served within the State of California, or if the defendant has entered a voluntary appearance in the action, the form of Request for Entry of Default should be used. This form requests the clerk to enter the default and must be signed by the attorney of record for the party requesting the default.

If the defendant has been served by publication, or by personal service outside of this state after an order for publication has been obtained, the form of Default Entry (by court) must be used since the court must enter the default in such cases.

Before filing the Request for Entry of Default by the clerk, attorneys should be sure that the summons with proof of service is on file and that the time for the defendant to answer has expired or that the appearance of the defendant has been filed of record for at least 10 days.

Before presenting the Default Entry (by court) form, attorneys should ascertain that the time to answer has expired and that the following papers are on file, the Affidavit for Publication of Summons, the Order for Publication of Summons, the Affidavit of Mailing, Affidavit of Publication, and the Summons. If service is made personally outside of this state, the following papers must be on file, the Affidavit for Publication of Summons, the Order for Publication of Summons and the Summons with proof of service thereon.

DISMISSAL OF ACTION

Request to the clerk for the entry of dismissals must be signed by the attorney for the plaintiff and also by the attorney or attorneys for any defendant or defendants who have set up a counter-claim or who have sought affirmative relief by way of a cross-complaint or an answer.

After the entry of an Interlocutory Judgment of Divorce, neither party shall have the right to dismiss the action without the consent of the other. Therefore, in such cases the request for dismissal must be signed by the attorney or attorneys of record and also by both parties to the action.

FINDINGS AND JUDGMENTS

Findings and Judgments must be served upon opposing counsel and should then be presented to the clerk of the trial department where the case was tried, even if the trial judge is no longer sitting in that department. Findings and Judgment must be under separate cover and should be served and presented to the court within 10 days after announcement of decision unless otherwise ordered (Rule 19).

APPEALS

When a request for the preparation of a reporter's transcript on appeal is filed with the clerk, an extra copy of the request should be presented to the clerk since a copy of the request must be transmitted by the clerk without delay to the reporter.

When appeal is taken on an agreed statement under Rule 6 or on settled statements under Rule 7a and 7b of the Rules on Appeal, care should be taken that all of the matters required under the respective rule are set out. The record must be prepared on opaque, unglazed white paper, not less than eleven pound weight, 8 x 10 inches in size. Only one side of the paper should be used, and the margin should not be less than 1¼ inch on the left-hand side of the page. The lines on each page should be double-spaced, and the pages numbered consecutively. The statement should be bound on the left-hand side and the cover must contain the title of the court to which the appeal is taken.

When the parties have been notified by the clerk of the reviewing court that an appeal has been set for hearing, each party should file with the clerk of the Superior Court, a notice specifying such of the original exhibits or affidavits designated by any party for inclusion in the record as he desires transmitted to the reviewing court (Rule 10b, Rules on Appeal). This document should be entitled in the Superior Court and should be designated "Request for Transmission of Exhibits." It should be filed with the clerk of the Superior Court as soon as possible after receiving notice that the appeal has been set for hearing.

An appeal from the Superior Court may be voluntarily abandoned and dismissed at any time before the filing of the record in the reviewing court (Rule 19a of the Rules on Appeal). The appellant may file in the office of the clerk of the Superior Court a written abandonment of the appeal; or the parties may file in said office a stipulation for abandonment. The filing of either document shall operate to dismiss the appeal and to restore the jurisdiction of the Superior Court.

CREDITOR'S HOMESTEAD PROBLEMS

(Continued from page 362)

execution proceeding.

Effect of Execution Proceedings

Many an unhappy creditor has learned, to his sorrow, that the *sole* and *exclusive* method of effecting an execution upon homestead property is set forth in CIVIL CODE Sections 1245 *et seq.*, which provide, in essence, a procedure for reaching excess funds over and above the homestead exemption amount. Not only is a *conventional* levy ineffective against homestead property but a creditor is allowed only one bite out of the apple.[2]

In the *Arighi* case[3] the court stated:

> "The record shows that the original judgment creditor did not comply with the sections quoted. (1253, 1254.) It is not contended that he did. However, appellant, his assignee, did file such a petition, and it was denied. The ruling was proper. The failure on the part of Rule & Sons, Inc., to perfect their levy of execution by a filing of petition for appointment of appraisers *within sixty days* after the levy, had the effect of extinguishing the lien of the execution, and *precluding any subsequent levy of execution* against the homestead property based upon that same judgment. (Citing authority)" . . . (Emphasis added).

Further in the same vein and to demonstrate the general pattern, let us consider the unhappy plight of the creditor involved in the case of *Phelps vs. Loop*.[4]

In that case a creditor desired to execute against an apartment house owned by the debtor. The creditor claimed the apartment house was worth about $25,000 but desired to test the validity of a homestead exemption which would have entitled the debtor to an exemption of $5,000. The creditor therefore, after filing a petition for the appointment of an appraiser under section 1245 (the first step for execution upon homestead property), filed a declaratory relief action to test the validity of the homestead. The creditor did not serve a copy of her petition as required by section 1248 for execution upon homestead property because she was of the opinion that she could not prosecute both the declaratory relief action and the execution proceeding at the same time, and she therefore chose to prosecute the declaratory relief action first so

[2] *Arighi vs. Rule & Sons, Inc.*, 41 C.A.(2d) 852.
[3] *Ibid.*
[4] 73 C.A.(2d) 39.

that if the court sustained her in that action, she "could then safely enforce her execution as against defendants' entire property."

The creditor further contended that the proceedings by way of petition for appointment of appraisers were necessarily suspended and had to "remain dormant" during the time the declaratory relief action was pending, and that, therefore the time consumed in prosecuting that action should not be included in computing the time within which she was required to proceed with her application for appointment of appraisers. The court held that the declaratory relief action did not extend the time within which the creditor was required, under said section 1248, to serve the petition upon the debtors as stated. "Appellant having failed to serve the first petition within ninety days after it was filed, the lien of the first execution ceased at the expiration of said period of ninety days and she was not entitled thereafter to have an execution, based upon the same judgment, levied upon the homestead."

Since a debtor may effectively declare a homestead at any time prior to the *recordation* of an abstract of judgment and thereby avail himself of the protection of the homestead statutes, it would seem to behoove a judgment creditor to run the records to date at

the time of filing his levy of execution, in order to assure himself that no homestead has been declared. Furthermore it seems highly advisable to proceed as expeditiously as possible with the sale proceedings and to check the records regularly *and up until the actual sale* since a homestead may be declared *after* the levy of execution had been made. Thus in *Yager vs. Yager*[5] the court stated a homestead may be filed after levy of execution, and provided there is not a valid and subsisting judgment lien on the property, it is not subject to execution sale except upon proceedings had under sections 1245-1259 of the Civil Code, for reaching the excess in value above the homestead exemption of $5,000."

Effect of Increase in Exemption Amounts

As originally enacted, the homestead statutes provided exemption amounts of $5,000 and $1,000 for marital homesteads and "homesteads of others," respectively. In 1945, these amounts were increased to $6,000 and $2,000, respectively and in 1947, they were increased to their present stature, namely, $7,500 and $3,000. For some time after these recent amendments, there existed a question as to whether these increases in the amount of exemption might be deemed to operate retroactively upon existing homesteads. It appeared most likely that they would be so considered, since to hold otherwise would give rise to a state-wide deluge of abandonments of existing homesteads (since a person may have only one homestead) and a resulting deluge of new declarations.

The only case which the writer has been able to locate which flatly holds that the amendments operate retroactively is a local probate case, *Estate of Durham* (L. A. Probate Case No. 286424) (Affirmed as to other points involved, 108 A.C.A. 178).

The effect of these amendments on the accrued rights of creditors was considered in the case of *In re Rauer's Collection Co.*[6] In that case the debt arose in 1939, and the homestead was declared in the same year. A judgment was rendered on the debt in 1945 and an abstract thereof was recorded in 1946. In July of 1947, execution was properly levied. The debtor contended for retroactive application of the recently amended exemption statutes, in order to avail himself of the higher amount. The court, in a scholarly and well-written opinion, held that the exemption amount which was in effect at the time when the debt arose would control, since to hold otherwise would operate to impair the obligation of contracts, but added

[5] 7 C.(2d) 213 at 217.
[6] 87 C.A.(2d) 248.

"As a prospective and not a retroactive interpretation must be given to the 1945 amendment to section 1260, it is obvious that the exemption to which respondents are entitled is that which was in existence at the time of the creation of the debt upon which the judgment is founded, namely, $5,000.

Mention is made by respondents of the amendment of section 1260 in 1947, raising the homestead exemption to $7,500. This, like the 1945 amendment, cannot be given a retroactive effect so far as petitioner is concerned.

"In holding that the amendment is not retroactive, we expressly are not holding, as petitioner would have us do, that to avail themselves of the increased exemption as to debts created, or contracts entered into, after the effective date of the amendment, it is necessary for the property owners who theretofore filed declarations of homestead to file new declarations."[7]

Effect of Bankruptcy

Since Section 70 of the Bankruptcy Act provides that title to the assets of the bankrupt passes to and becomes vested in the trustee, it had seemed logical to assume that the bankrupt could not effectively declare a homestead, after having been adjudicated a bankrupt.

However, the case of *Sampsell vs. Straub*[8] has given rise to some new thoughts upon the subject. In that case the bankrupt executed a declaration of homestead before filing a petition in bankruptcy, but failed to record it until after having been adjudicated a bankrupt. Our local Federal District Court (Judge Peirson M. Hall) ordered the homestead set apart to the bankrupt as exempt, on the ground that Section 70c of the Bankruptcy Act provides that the Trustee" . . . shall be deemed vested as of the date of bankruptcy with all the rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings. . . .", and that, since a money judgment is not a lien in this state until an abstract is recorded and since the trustee is not in the same position as a judgment creditor *having a judgment lien*, the adjudication in bankruptcy did not prevent the subsequent homestead. Moreover, the court found, the "passage of title" theory is not applicable to *exempt* property (Section 6 of the Act).

The case was affirmed by the 9th Circuit, which adopted the rationale of Judge Hall. On rehearing, the 9th Circuit, under date

[7] *Id* at 254.
[8] 189 F.(2d) 379.

of December 27, 1951, reversed itself and disallowed the homestead. The reasoning of the Court is rather obscure, but seems to revolve around a construction of Sections 67(B) and 70(C) of the Bankruptcy Act. Under California Law, a judgment creditor may acquire a lien by recording an abstract of his judgment, as provided for by Section 674, CODE OF CIVIL PROCEDURE but does not automatically acquire a lien by securing a judgment. A judgment creditor according to the Court, must do what the Trustee need not do, to acquire a lien because the Court is persuaded that it was not the intent of Congress to relegate a Trustee in Bankruptcy to an inferior position. A petition for certiorari to the Supreme Court was denied on April 21, 1952.

Effect of Re-Marriage

The case of *Carroll vs. Ellis*[9] involved a situation wherein the defendant Ellis and his wife executed a declaration of homestead on the premises owned by them. Later, they executed a deed to X who, at the same time and as part of the same transaction, reconveyed the same premises to Ellis alone. The second deed was the sole consideration for the first and the Ellises never relinquished

[9] 63 Cal. 440.

possession. The plaintiff contended that the deed out by the Ellises destroyed the homestead and California Supreme Court agreed, stating:

"There can be no doubt, however, there was a period of time, however short, during which the title to the undivided one half was vested in . . . [X] . . ."[10]

It had appeared, therefore, as a result of such ruling, that conveyances by a homesteader to a third person, even if made for the sole and apparent purpose of changing the tenure in which title was held (e.g. a deed from husband and wife, holding title as tenants in common or as community property, to a "straw man" who, simultaneously therewith, executed a conveyance back to them "as joint tenants") operated to destroy the homestead. Moreover, this appeared to be a very logical result, since, in order to accomplish the result intended, the instrument had to actually be a conveyance and operate as such and if so, the grant would appear to operate as an abandonment, under the provisions of CIVIL CODE Section 1243.

However, the more recent case of *Vieth vs. Klett*[11] concerned a widower who resided on the premises with his three minor children and who recorded a "head of family" homestead declaration. Several months later, he remarried and he and his new wife and the children thereafter continued to reside on the premises. Subsequently, he and his wife, without consideration, deeded the property to a "straw man" who simultaneously therewith deeded it back to them as joint tenants. A creditor who had obtained a judgment against him levied an execution on the premises but was enjoined from conducting a sheriff's sale. Admittedly, the creditor did not proceed under the execution procedure applicable to homesteads[12] but he contended that the deed to the "straw man" had destroyed the homestead. The Court disagreed, stated that the conveyance to the "straw man" did not convey such an interest as to create an abandonment of the homestead under the law. The court also indicated that a homestead prior to marriage may exist for the benefit of the wife under a subsequent marriage, stating "The property in question being the separate property of Edward J. Vieth at the time he legally declared a homestead thereon it remained his separate property upon and after his remarriage, and until by appropriate instruments he and his second wife took the same as joint

[10] *Id.* at 442.
[11] 88 C.A.(2d) 23.
[12] CIVIL CODE, §1245 *et seq.*

tenants. During all of that time the property remained impressed with the homestead *which continued for the benefit of the second community*. To hold otherwise would do violence to the foregoing expressed public policy of this state . . ."[13]

The court attempted to distinguish the *Carroll* case on the ground that there "was nothing contained in the deed, nor in the findings of the court, which might indicate that the transaction (in the *Carroll* case) was without consideration, and was effected, as in the instant case, solely for the purpose of reconveyance of the property to such grantors as joint tenants."

The court's statement that the homestead "continued for the benefit of the second community" appears to be pure dicta and gives rise to the question as to whether this case must be confined to its particular facts. The following questions occur to the writer:

(1) Would a homestead "open up" and embrace a newly-acquired husband, where a widow had declared? *Estate of Ronayne*, 104 C. A.(2) 53 says that it would not (on different facts).

(2) Would the result have been different if there had been no minor children involved?

(3) Suppose that the widower resided alone on the premises (thereby giving rise to a $3000 exemption under CIVIL CODE 1260, Subdivision 2), would the "continuation for the benefit of the second community" in some strange fashion automatically increase the exemption amount to $7500 (CIVIL CODE 1260, Subdivision 1)?

(4) If there were no creditor involved, but the declarant had died after remarriage could the new widow successfully convince the court that public policy dictated that the previously declared homestead should "open up" and embrace her?

(5) If the declared homestead does so "open up" what characteristics of homestead will enure to her—that of exemption alone, or does the characteristic of devolution upon death also come into being?

(6) If the characteristic of devolution upon death comes into being, she would take in fee as the surviving spouse (PROBATE CODE Section 663) so that the property would never pass to the estate of the deceased husband. This gives rise to the startling thought that a newly-acquired spouse might, in effect, become a joint tenant with the owner-declarant.

(7) Suppose that before remarriage but after the declaration

[13]88 C.A.(2d) 23 at 28.

of homestead he made a will leaving the property to his children in equal shares. Absent the voluntary creation of a new joint tenancy, upon his death would the "opening up" pass title to the widow and defeat his will?

As we have seen, this new theory of a homestead "continuing for the benefit of a second community" gives rise to a host of problems and whereas that language in the *Vieth* case appears to be pure dicta, it may well be adopted as the thesis for future litigation.

Succession to a Survivor

PROBATE CODE Section 668 provides:

> "A person succeeding by purchase or otherwise to the interest of a surviving spouse in a homestead, which has been declared in the lifetime of the decedent, shall have the same right to apply for an order setting aside the homestead to him as is conferred by law on the person whose interest he has acquired."

It has been held that a devisee of a surviving wife falls within this class[14] as do the heirs at law.[15] Where the homestead property was sold out of the estate of the declarant, the proceeds of the sale were distributable to the heirs as exempt from the claims of creditors.[16]

Exemption of Proceeds After Sale

Where the homestead is sold, the proceeds therefrom maintain the exemption for a period of six months after sale, if such proceeds are used to purchase another home *and* a new declaration is filed on the new home within the six month period.[17]

Abandonment of Homestead

The question as to what constitutes an abandonment of homestead often gives rise to knotty problems. Prior to 1949, CIVIL CODE Section 1243 read as follows:

> "A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged:
>
> 1. By the husband and wife, if the claimant is married;
> 2. By the claimant, if unmarried."

Frequently, in divorce matters wherein the parties sought to divide their respective holdings, one spouse would execute a deed to the other of the home which was subject to a homestead. There can be no doubt that such a deed operated to pass the fee title of the grantor, but it appears highly questionable whether such a deed

[14] *Estate of Fath*, 132 Cal. 609.
[15] *Estate of Muntz*, 69 Cal. App. 404.
[16] *Estate of Iredorio*, 100 Cal. App. 469.
[17] CIVIL CODE, §1265A.

served to terminate the homestead rights of the grantor. These homestead rights are something separate and apart from the fee title, because CIVIL CODE Section 1242 requires that a conveyance of the homestead be by an instrument jointly executed and acknowledged by both husband and wife.

In 1949, CIVIL CODE Section 1243 was amended to provide that the homestead could be abandoned by a declaration of abandonment or a grant thereof executed and acknowledged by the husband and wife *jointly or by separate instruments* (new matter underscored). This attempt by the Legislature to obviate the above-mentioned difficulty appeared to have fallen short of its mark inasmuch as CIVIL CODE Section 1242 still required *joint* execution and acknowledgment of conveyances of homesteads.

In 1951, the procedure for conveyance of the homestead as between spouses was recast by the new amendments to CIVIL CODE Sections 1242 and 1243, which now provide in essence that either spouse may convey to the other his or her interest in the homesteaded premises and such conveyance shall also pass the homestead rights of the grantor, *unless such rights are expressly reserved therein.*

The execution of a conveyance of homesteaded property, must be *the personal* act of the party. In *Gagliardo vs. Dumont,*[18] plaintiff who owned the land where he and his wife resided, executed and recorded a declaration of homestead. The plaintiff later gave a power of attorney to a family friend. The attorney-in-fact and the wife subsequently executed a deed of the premises to a third person and thereafter plaintiff's wife died. The Court held the conveyance to be ineffective and awarded the property to plaintiff as the surviving spouse under a marital homestead.

This point has taken on additional significance in more recent years, where the husband leaves for the service, after having given a power of attorney to his wife and either there is a homestead then of record or the wife later executes one. In either event, the deed of the wife, individually and as attorney-in-fact of the husband, is ineffective. Moreover, she would be precluded from executing an encumbrance thereon, for the same reason.

Vacating the Premises

What is the effect upon the homestead, when the parties vacate the premises and move elsewhere? In *Porter vs. Chapman,*[19] the

[18] 54 Cal. 496.
[19] 65 Cal. 365.

plaintiffs declared a marital homestead upon their home. The husband later obtained employment in Arizona, moved his family there, became a citizen of that territory, voted in its elections and ran for public office there. In voiding an execution sale of the premises the Court pointed out that a homestead could not be abandoned except in the statutory mode.

Effect of Desertion by a Spouse

There appears to be no law in this state as to the effect upon a homestead of the desertion by a spouse. In other jurisdictions, the authorities have travelled in opposite directions. In South Dakota, where the homestead statutes closely parallel those of California, a husband who had deserted his wife and family was permitted to challenge the validity of a deed by the wife alone on the grounds that he had not lost his homestead rights by desertion of his family.[20] It is interesting to note, however, that the court chided the counsel of the wife for not having argued the theory of estoppel against the husband, since his abandonment of the family appeared to be wrongful. Tennessee, however, has deprived the deserting husband of his homestead right.[21] It is interesting to note, however, that the cases seem to uniformly hold that the homestead rights remain for the benefit of the deserted spouse and the family.[22]

Effect of Divorce

The effect of a divorce upon a homestead in California also gives rise to interesting questions. CIVIL CODE Sections 146 and 147 (prior to the repeal of the latter in 1951) set forth the power of the court with regard to the disposition of homestead property in a divorce proceedings. The 1951 amendment to CIVIL CODE Section 146 adds "or separate maintenance" wherever the word "divorce" appeared and includes the material formerly in CIVIL CODE Section 147 (now repealed). The determining factor in each instance is the character of the property at the time when the declaration of homestead was recorded. If declared on *community property* of the spouses, the court has wide discretion, whereas if declared on the *separate property* of either spouse, the court has but little latitude, as will hereinafter appear:

(a) *Community Homestead.*

Where declared upon property which was the community prop-

[20] *Somers vs. Somers*, 131 N.W. 1091, 36 L.R.A.(N.S.) 1024.
[21] *Lusk vs. Hitt*, 7 Tenn. App. 389. For a comprehensive collection of cases of this subject generally see 36 L.R.A. (N.S.) 1024 *et seq.* and 40 CORPUS JURIS SECUNDIUM, 634 *et seq.*
[22] *Cf. Weinbrod vs. Rohdenburg*, 175 W.E. 379 (Ill.); *Lusk vs. Hitt*, 7 Tenn. App. 389.

erty of the spouses, the court *may* dispose of the homestead as follows:

(1) Assign it to the innocent spouse absolutely, or for a limited period of time, regardless of the grounds for divorce; or, if the ground for divorce be incurable insanity, assign it to the party against whom the divorce is granted, either absolutely or for a limited period of time; or

(2) Divide it between the spouses, either in severalty or otherwise. In making such division, the court has a wide discretion and the division so made may be either equal or unequal.[23] If, for the purpose of making such a division of the community homestead, it should become necessary to do so, the court may order a partition of the property or a sale thereof and a division or other disposition of the proceeds.

(b) *Separate Homestead.*

If the homestead has been declared upon the separate property of either spouse, it is mandatory upon the court to dispose of it in one of the following ways:

[23] *Smith vs. Smith*, 124 Cal. 651.

(1) If the ground for divorce is other than incurable insanity, it *must* be assigned to the former owner subject to the power of the court to assign it for a limited period only to the spouse not in title, if the latter be the innocent party. Such "limited period" may be of definite duration (i.e. for a term of years) or for the life of the innocent spouse, but in any event, such interest terminates upon the death of the innocent spouse. In lieu of such limited assignment to the innocent spouse, the court may award a specific sum for alimony and adjudge it to be a lien on the premises.

(2) When the ground for divorce is incurable insanity, the homestead must be assigned to the former owner, subject to the power of the court to assign it to the *party against whom the divorce is granted* for a term of years not to exceed the life of such party.

It is interesting to note that, with the sole exception of incurable insanity, the ground for divorce has no bearing upon the disposition of the homestead. It depends upon the underlying title.

Any disposition of the homestead contrary to CIVIL CODE Section 146 is void on the face of the record, confers no rights, and may be collaterally attacked at any time.[24]

(c) *No Disposition Made.*

When property rights are not placed in issue and such question is not before the divorce court, no disposition of the homestead may be made and the rights of the parties are then as follows:

(1) *Community Property Homestead.*

Title vests in the parties as tenants in common and their respective interests therein are subject to determination in a *further* action and such property is subject to a partition action brought by one former spouse against the other.[25]

(2) *Separate Property Homestead.*

Title is held in the spouse on whose separate property the homestead had been declared, absolutely free from all claims of the other spouse. Moreover, the right of such other spouse, if the innocent party, to have the homestead assigned for a limited period is *lost* unless this right is claimed in the divorce action and is actually reserved by the decree of divorce.[26]

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[24]*Neary vs. Godfrey*, 102 Cal. 338.
[25]*Lang vs. Lang*, 182 Cal. 765.
[26]*Burkett vs. Burkett*, 78 Cal. 310.

(d) *Effect of Interlocutory Decree.*

Whereas the interlocutory decree of divorce may properly determine the character of the underlying title (*i.e.* separate or community) and by such finding determine the manner of disposition upon final dissolution of the marriage, such decree cannot of itself destroy the homestead character of the property.[27] Under the cases, it would appear that no attempt should be made at the time of the interlocutory decree to award the property to either spouse. Although such a determination or award might become conclusive if no appeal is taken or a defaulted defendant failed to move under CODE OF CIVIL PROCEDURE Section 473, the fact remains that the marriage continues until dissolved by final decree, and both spouses are restrained from dealing with the property alone.

Where property which has not been homesteaded is awarded to one spouse by the interlocutory decree as separate property and thereafter, before the final decree, the spouse in title declares a marital homestead, it would seem that all the characteristics of a marital homestead attach, although the homestead might later be destroyed by the final decree of divorce.

Does Divorce Destroy the Homestead?

What effect does a decree of divorce have upon all three characteristics of a statutory homestead, namely: exemption, restraint upon alienation, and devolution upon death? Under the cases, the exact effect thereof is not entirely clear. Several cases have broadly stated that "upon dissolution of the marital status by court decree and the assignment of the homestead therein, its character as such is destroyed."[28] As a result, one often hears the expression "No marriage—no homestead." A closer analysis of the cases, however, discloses that for the most part they represent contests between ex-spouses, and not between the spouse in title and a creditor. It seems certain from such analysis that as between *ex-spouses* the homestead characteristics of *restraint upon alienation* and *devolution upon death* have been destroyed by the court decree; but as to the characteristic of *exemption*, the line of cases above cited do not appear controlling.

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[27]As to the effect of adjudication of property rights, in general, by the interlocutory decree of divorce see *Leupe vs. Leupe*, 21 C.(2d) 145. As to the effect of intervening reconciliation, see *Peters vs. Peters*, 16 C.A.(2d) 383.

[28]*Remley vs. Remley*, 49 C.A. 489 and cases cited therein.

In *City Store vs. Cofer*,[29] a creditor sought to levy execution upon homestead property vested in one former spouse as separate property, but the court held that *the homestead was unaffected* by divorce and that therefore the property was exempt from execution in satisfaction of judgments other than those specified in the statute.

The case of *Lang vs. Lang*[30] holds that divorce destroys the homestead *as a general rule*, but employs language which intimates that the exemption feature will remain if the spouse who was awarded the homestead is still the head of a family (*i.e.* minor children residing on the premises). A recent federal case, however, clearly holds that the homestead exemption ceases upon the dissolution of the marriage by divorce.[31]

The situations discussed herein are some which come readily to mind and do not by any means purport to exhaust the field, although it should establish that the judgment creditor really does have homestead problems.

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[29]111 Cal. 482. This case seems to overrule by implication the case of *Grupe vs. Byers*, 73 Cal. 271.
[30]182 Cal. 765.
[31]*Master Lubricants Co. vs. Cook*, 159 F.(2d) 679 (C.A. 9th).

ETHETICS OPINIONS

(Continued from page 367)

may publish or publicize legal information designed to fulfill the laudable purpose of avoiding multiplicity of suits and preventing the development of misunderstandings in the planning of human affairs, business and estates. The modern Bar Association has a great responsibility to the public and to its own members, to establish good public relations for the entire Bar, and thus render the Bar better able to improve the administration of justice. The improvement of administration of justice is well achieved by advising the public on fundamental legal concepts as they affect daily life.

The Committee on Professional Ethics, American Bar Association, in its Opinion No. 179, dated May 8, 1938 (see also Opinion No. 121, Committee on Professional Ethics, American Bar Association, dated December 14, 1934) indicates beyond any question their approval of a Bar Association employing advertising facilities to acquaint the lay public with the expert services the legal profession is able to render, especially with respect to the advisability of securing competent legal advice to protect the client's interest and avoid future difficulties and litigation.

A Bar Association may properly make clear to the lay public its objectives in providing public information on legal matters that will be beneficial to the layman and thus enable lawyers to perform better professional services. It would seem to be relatively immaterial whether this be done by publication in magazines, in newspapers, or by radio or television. The opinion of the Committee on Legal Ethics, Los Angeles Bar Association, Opinion No. 186, dated November, 1951, indicates that it would be proper for a Bar Association to sponsor a series of television broadcasts providing public information on legal matters, subject to the precautions therein mentioned. Among these precautions deserving of reiteration are:

"First, it should be carried on by the organized Bar in order that any semblance of personal solicitation will be avoided.

"Second, it should be made plain that the purpose is to give the layman professional information, to enable lawyers as a whole to render better service, to promote order in society, to prevent controversy and litigation, and to enhance the public esteem of the profession.

"Third, it must truly and actually be motivated by a desire to benefit the lay public and the plan must be carried out conscientiously so as to avoid the impression that it is actuated by selfish desire to increase professional employment.

"Fourth, the plan should be executed in a dignified manner, consistent with the traditions of the legal profession."

It is also very clear that an individual attorney may write general articles upon legal subjects for publication. (See Opinion No. 148, Committee on Legal Ethics, Los Angeles Bar Association, dated February 14, 1944, and Canon 40, Canons of Professional Ethics, American Bar Association.)

II

It is equally clear that an attorney may not conduct a "legal query column" in a newspaper in which said attorney would answer specific questions, nor may an attorney invite questions about legal problems from readers of the publication. (See Opinion No. 8, Committee on Legal Ethics, Los Angeles Bar Association, dated December 31, 1920; Opinion No. 175, Committee on Legal Ethics, Los Angeles Bar Association, dated August 27, 1951; and Opinion No. 181, Committee on Legal Ethics, Los Angeles Bar Association, dated July 25, 1951; see also opinion to the same effect, Opinion No. 270, Committee on Professional Ethics, American Bar Association, dated November 30, 1945.) It is apparent that the conduct of a "legal query column" through a newspaper by an individual lawyer permits an apparent professional relationship between attorney and client to be carried out through an intermediary, such as a newspaper, a lay agency, which intervenes between attorney and client. It is obvious that the person advised through a "legal query column" is not only deprived of the benefit of disclosing to the lawyer such further facts concerning his problem which the lawyer might otherwise develop in the consultation between attorney and client, but also prevents the lawyer from observing the mandate of Canons 16 and 8, Canons on Professional Ethics, American Bar Association, relating to full knowledge of his client's cause before advising thereon, and deprives the client of any effective means of compelling the lawyer to adhere to any standard of professional adequacy, for no attorney-client relationship has been established. If an indi-

vidual attorney may not answer specific questions in the manner indicated, certainly a Bar Association may not do so.

III

An examination of the sample questions, and the answers of the Bar Association, submitted to this Committee with the inquiry, reveals the likelihood that the positive advice given to a legal-factual question posed might often result in the stirring up of litigation rather than the restraining of litigation. The practices indicated in the inquiry might also raise the possibility of an inquiring layman seeking legal advice as to confidential matters without realizing that were he to raise questions of fact with his own attorney, the facts disclosed and the opinions given are professionally privileged. The Bar Association, by conducting such a column through a newspaper would thus stir up controversies and trap each "client" into disclosing to the newspaper and its staff confidential information which it may be to that client's interest to disclose only to his attorney.

* * * * *

In conclusion, this Committee feels the practices suggested in the inquiry would confuse a Bar Association's legal aid function, public relations function, and its function in promoting the administration of justice by public education. The committee further feels that the practice proposed improperly enables a newspaper to practice law, and it not only constitutes unprofessional conduct by the members of the "inquiry" committee, but may constitute in effect improper conduct by the Bar Association involved.

Bar Association may properly (a) through a committee of lawyer members, publish under its own auspices, either in a newspaper or elsewhere, a series of papers addressed to the lay public designed to assist the public in appreciating the benefits and advantages of preventive legal services and prevent the development of controversies and litigation, (b) create a supervised impartial lawyers' reference service to guide laymen able to employ a lawyer to a competent practitioner, and (c) set up a legal aid service to assist those unable to pay but in need of a lawyer's service. The committee feels that the practices suggested in the inquiry do not properly serve these useful purposes and are unprofessional.

This opinion, like all other opinions of this Committee, is advisory only. (By-Laws, Article VIII, Section 3.)

MRS. MARIAN G. GALLAGHER MARCH 1951
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